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In the Supreme Court of the United States

OCTOBER TERM, 1984

L. ANN WEST, AS MOTHER AND ADMINISTRATOR OF THE ESTATE OF LORRI WEST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners, a former serviceman and his wife, seek damages from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, for injuries to their children that allegedly were caused by the Army's negligently misinforming the serviceman of his blood type. Petitioners contend that the courts below erred in holding that their claims are barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which precludes FTCA suits by servicemen for injuries incident to military service.

1. On January 15, 1971, petitioner Stanley West was inducted into the United States Army. Prior to his induction, Stanley West, like the thousands of other persons inducted into the armed services, was given a physical examination by Army physicians to determine his fitness for military service. In accordance with governing Army regulations, this examination included the taking of a blood

sample. After his induction, West received his identification ("dog") tags which, as required by Army regulations, were "embossed * * * with [his] blood type" (Army Reg. No. 612-10, ¶ 2-9(d) (1971)). According to the complaint, the dog tags identified West's blood type as A-Negative. Pet. App. 10.

In 1973 Stanley West was discharged from the Army and married petitioner L. Ann West. Her blood type is A-Negative. Six years later, in 1979, Ann West gave birth to twin daughters who were born with birth defects. One of the daughters died within one week of birth. The other survived but has required extensive medical care. Pet. App. 10.

In 1982—more than ten years after Stanley West's pre-induction physical—petitioners brought this action under the FTCA in the United States District Court for the Central District of Illinois. Petitioners sought damages on behalf of themselves and their daughters for the alleged negligence of the Army in misclassifying Stanley West's blood type (Pet. App. 11). The complaint alleged that Stanley West's blood type is A-Positive, not A-Negative as embossed on his dog tags; that the incompatability in Stanley's and Ann's blood types caused their children to be born with birth defects; and that the Army's erroneous classification of Stanley West's blood type on his dog tags was the proximate cause of the injuries to the children. Pet. App. 10.

2. The district court dismissed the complaint (Pet. App. 1-8). The court reasoned that "[s]ince any negligent conduct of the United States occurred either while Stanley was in the service (identification tags given to Stanley) or while determining whether he was qualified for service, the *Feres* doctrine compels dismissal of his claim" (*id.* at 6-7). The district court noted that "it has been consistently held that derivative claims of family members for injuries received incident to service are barred by *Feres*" (*id.* at 7 (citing cases)).

A panel of the court of appeals reversed (Pet. App. 9-24). The panel squarely ruled that "the Army's alleged negligence was incident to Stanley's military service" (*id.* at 14). But the panel concluded that, because petitioners' claims were for injuries to their children, the policies underlying *Feres* did not require that the claims be barred (*id.* at 16-24). The panel reached this conclusion even though it expressly acknowledged that "the children's injuries have a causal connection with their father's military service" (*id.* at 16).

The court of appeals granted rehearing en banc, thereby vacating the panel opinion (Pet. App. 25-26) and then affirmed the district court's dismissal of petitioners' complaint by an equally divided vote (*id.* at 27).

3. The decision of the court of appeals is correct; there is no conflict in the circuits; and there is no opinion of the court of appeals. See *Eaton* v. *Price*, 364 U.S. 263, 264 (1960). Moreover, this Court has repeatedly declined review in cases presenting claims indistinguishable from petitioners'. Further review is therefore unwarranted here as well.

a. In several recent cases, claims under the FTCA have been brought on behalf of children of former servicemen, alleging that the servicemen were exposed to nuclear radiation during military training exercises and that the effects of the radiation on the servicemen caused genetic damage to the children. In each case, the court of appeals held that *Feres* barred the children's claim, and this Court denied certiorari. *Mondelli* v. *United States*, 711 F.2d 567, 569 (3d Cir. 1983), cert. denied, No. 83-632 (Feb. 21, 1984); *Lombard* v. *United States*, 690 F.2d 215, 223-226 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Laswell* v. *Brown*, 683 F.2d 261, 269 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Monaco* v. *United States*, 661 F.2d 129, 133-134 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982). Similarly, in *Scales* v. *United States*, 685 F.2d 970 (5th Cir.

1982), cert. denied, 460 U.S. 1082 (1983), the child of a former servicewoman sought damages under the FTCA, claiming that he was born with congenital rubella syndrome because military personnel negligently administered a rubella vaccine to his mother, while she was on active duty, without determining whether she was pregnant; negligently failed to ascertain that she was pregnant when she contracted rubella; and, after she became pregnant, negligently failed to advise her that she had been diagnosed as having rubella. The court of appeals held that the child's claim was precluded under *Feres*, and this Court again denied review.

Petitioners' claims are indistinguishable, and review should be denied here for the same reasons. The principal purpose of the *Feres* doctrine is to avoid both judicial interference with "[t]he peculiar and special relationship of the soldier to his superiors" and the "effects * * * on [military] discipline" of allowing a serviceman to bring an FTCA suit challenging decisions made incident to his military service. *United States* v. *Brown*, 348 U.S. 110, 112 (1954). As this Court has ruled, and as we explained in our memoranda in opposition in *Monaco* and *Scales*,[1] the damaging results that the *Feres* doctrine is intended to avoid will come about whenever a suit is based on an injury that "arise[s] out of or [occurs] in the course of activity incident to [military] service" (*Feres*, 340 U.S. at 146). It is immaterial whether the suit is brought by the serviceman himself or by another party whose injury derives from something that was done to the serviceman in the course of his military service. See *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977):

> [T]he effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take

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[1]We have sent copies of those memoranda to counsel for petitioners.

> virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions.

See also *Mondelli*, 711 F.2d at 569 ("[A]n action by a * * * dependent would raise the same issues, and require the same scrutiny of military decisions, as would an action by a soldier or sailor against the United States."); *Lombard*, 690 F.2d at 224 (citations omitted) ("[P]ermitting the aggrieved third parties to recover would embroil the courts in a matter * * * that was basically, though indirectly, 'between members of the armed services.' "); *Scales*, 685 F.2d at 974 ("In either instance, the judge is placed in the position of questioning the propriety of decisions or conduct of fellow members of the Armed Forces. This is precisely the type of examination that *Feres* seeks to avoid."); *Monaco*, 661 F.2d at 134 ("the court still must examine the Government's activity in relation to military personnel on active duty").

The only negligence alleged in petitioners' complaint concerns the "mistyping [of] Stanley G. West's blood [type] on Government forms and on identification tags upon his induction into the Department of the Army" (Complaint 3). Petitioners do not deny that these actions by the military were—as even the panel explicitly held—incident to Stanley West's military service (see Pet. 12). Petitioners also do not, and cannot, deny that a trial in this case would therefore necessarily focus on the procedures followed and actions taken by military officials in analyzing Stanley West's blood and in issuing his dog tags. Thus, a trial of this suit "would raise the same issues, and take the same form as an action" for negligence by Stanley West himself (*Mondelli*, 711 F.2d

at 569). Since any such action by Stanley West challenging these decisions made by Army officials would unquestionably be barred by *Feres*, "it is impossible to see how the result should be different if [his children] su[e] the government instead" (*Scales*, 685 F.2d at 974).

Petitioners, like the panel, attempt to escape the force of this logic by emphasizing that "Stanley West never suffered any direct injury" and that "there was no actionable tort in existence during the active military service of Stanley West" (Pet. 7) because the cause of action did not accrue until his children were born with injuries (see *id.* at 8, 9, 18). Precisely the same argument was made in *Scales*, and it did not persuade this Court to grant review. See also *Monaco*, 661 F.2d at 133. Petitioners fail to explain why it should make a difference, for purposes of the *Feres* doctrine, whether, as a matter of the technicalities of the common law, an actionable injury is considered to have occurred at the time Stanley West received the mislabeled dog tags or only later when the alleged consequence of that mislabeling became manifest. Every action challenged by petitioners—every allegedly negligent act stated in the complaint—was an action taken by the military toward a serviceman incident to his military service. The trial of petitioners' claims would, therefore, focus on decisions by military personnel that were made incident to a serviceman's military service, and the very concerns that form the basis of the *Feres* doctrine—disruption of military discipline and second-guessing of what one military official did to another member of the armed services—would be directly implicated. See also *Lombard*, 690 F.2d at 223; *Monaco*, 661 F.2d at 133 ("[I]t would be anomalous for recovery to hinge on a fact as fortuitous as when an injury became apparent.").

b. Although petitioners assert that there is "confusion [among] the lower courts" (Pet. 15) about the application of

Feres to claims like theirs, petitioners do not cite any decision that conflicts with the decision below.[2] Petitioners assert that "[c]ivilians, including relatives of servicemen, have the right to bring suit for injuries under the Tort Claims Act when members of the military service are negligent while on active duty" (Pet. 11); but the cases cited by petitioners involved injuries to civilians that were not purely derivative from allegedly negligent actions taken by the military toward a serviceman incident to his military service. For similar reasons, petitioners' reliance (*e.g.*, Pet. 12-14) on *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), is misplaced; *Lockheed* involved an independent injury to a civilian employee of the United States, not a claim that derived from negligence incident to military service. Compare *Hillier* v. *Southern Towing Co.*, 714 F.2d 714, 723-724 (7th Cir. 1983).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[2]Indeed, petitioners emphasize (Pet. 8, 9) the "unique circumstances" of this case.

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